Supreme Court, U.S.
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No. 04-

05-8

IN THE

Supreme Court of the United States

BONNIE G. SNAVELY,

Petitioner,

v.

DOUGLAS MILLER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, notwithstanding the "probate exception" to federal jurisdiction, a federal court has authority to compel a state court not to enter final judgment in a testamentary case that the state court has already tried and announced oral findings of fact and conclusions of law and allow re-litigation in federal court of the validity and administration of a trust governing the disposition of a decedent's assets.

PARTIES TO THE PROCEEDING

All parties to the Ninth Circuit proceeding below are included in this petition's caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bonnie G. Snavely, respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is unreported but may be found at 124 Fed. Appx. 495 (9th Cir. 2005). The opinions of the United States District Court for the District of Montana (App. 12a-22a) and United States Bankruptcy Court for the District of Montana (App. 23a-80a) are both unreported.

JURISDICTION

The court of appeals entered its judgment on February 07, 2005, and denied a timely petition for rehearing and rehearing *en banc* on April 06, 2005 (App. 143a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The text of 28 U.S.C. §§ 1331 and 1334 are reproduced at App. 144a-145a.

STATEMENT OF THE CASE

Since the inception of the federal judiciary, this Court has held that the federal courts lack subject-matter jurisdiction over probate matters. See *Armstrong* v. *Lear*, 25 U.S. (12 Wheat.) 169, 175 (1827) (construing the jurisdiction of the federal courts by reference to English precedents); *Markham* v. *Allen*, 326 U.S. 490, 494 (1946) (stating that the Judiciary Act of 1789 deprived federal courts of jurisdiction in probate matters). Since that time the federal courts have struggled to define the precise contours of the probate exception, leading

Judge Richard Posner to call it "one of the most mysterious and esoteric branches of the law of federal jurisdiction." *Dragan* v. *Miller*, 679 F.2d 712, 713 (7th Cir. 1982) (Posner, J.). But, it has been sixty years since this Court last provided any guidance on the scope and meaning of the probate exception – *Markham* v. *Allen*, 326 U.S. 490 (1946) – and this case presents a suitable vehicle for giving further content to the exception.

With the exception of *Markham*, every single opinion by this Court directly applying the exception was written before the sea change in federal procedure and jurisdiction resulting from the promulgation of the Federal Rules of Civil Procedure, see Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072), the merger of law and equity in the federal courts, see Fed. R. Civ. P. 1, (stating that federal procedure is the same for law and equity) and the holding in *Erie Railroad* v. *Tomkins*, 304 U.S. 64 (1938). Hence, the circuit courts have been floundering to define the scope of the exception with almost no modern guidance from this Court. By 1965, the probate exception cases were already so confused that the American Law Institute voted unanimously to abandon drafting a restatement of the rule because "the Institute's members were unable to agree on the definition of the excluded subjects – not surprisingly, in view of the amorphous state of the law." David P. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. Chi. L. Rev. 268, 319 (1969). In the intervening four decades, the confusion has deepened. See Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. Cal. L. Rev. 1479, 1498 (2001) ("The competing shorthand formulae developed by the lower federal courts for determining the scope of the probate exception are on a collision course with one another.") The result is a haphazard patchwork of circuit splits that vary the scope of federal jurisdiction – and hence the quality of justice in the

federal courts – according to the accident of geography. Confusion over the probate exception has led to dangerous and unseemly friction between state and federal courts, as amply illustrated by this case. Accordingly, this Court's guidance is urgently needed.

Factual Background and Proceeding Below. On August 26, 1995, Mrs. Margueritte Miller died. Like an ever increasing number of Americans, Mrs. Miller chose to dispose of her assets through a combination of a will and an *inter vivos* trust. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1113 (1984) (discussing the importance of trusts as a will substitute). Mrs. Miller named her daughter, Bonnie G. Snavely, the petitioner, as her trustee. The only substantial asset in the trust was Mrs. Miller's large ranch ("the Ranch") in Montana. During her lifetime, Mrs. Miller was the primary beneficiary of the trust, and upon her death she instructed that the corpus of the trust be distributed to her children and other descendants.

After Mrs. Miller's death, petitioner administered the trust and, in accordance with the trust's provisions, sought to liquidate the trust by purchasing the Ranch from the trust and distributing the resulting cash among Mrs. Miller's heirs. As required by the governing Washington law, in August 2000, petitioner instituted an action in the King County Superior Court (the State Court) in the State of Washington to obtain judicial approval of her trust administration and the proposed sale. See Wash. Rev. Code §§ 11.106.030, 11.100.140.

Petitioner's brother, Douglas Miller, the respondent, opposed her action in the State Court. In a trial that lasted nearly three weeks, respondent attacked the existence of the trust and sought to prove that petitioner had committed various breaches of fiduciary duty under the trust instrument. At the close of all the evidence and legal argument, Judge J. Kathleen Learned issued comprehensive oral findings of fact and rulings of law dismissing all of the respondent's claims

against the petitioner, approving the sale, and setting a date for the final entry of a written order in accordance with the oral ruling. App. 95a-142a. During the brief interval between the State Court's oral reading of its decision and the technical entry of that decision, respondent hastily filed for bankruptcy in the District of Montana. Knowing that he had lost the state court trial, respondent sought a federal injunction against the consummation of the state court proceedings. However, Judge Learned concluded that the probate exception deprived the federal court of jurisdiction over the case, *id.* at 92a-94a, and entered her final ruling in written form, memorializing her oral ruling without significant alteration.

The bankruptcy court, however, insisted that the probate exception did not apply to this case and tried to wrest jurisdiction from the state court. Having been informed by the parties that the state court had analyzed its jurisdiction and intended to continue its post-trial proceedings, the federal court entered an injunction ordering the parties to discontinue any involvement in the state court's proceedings and sanctioning the petitioner for suggesting that the bankruptcy court lacked subject matter jurisdiction over the case. App. 81a-91a. The bankruptcy court then proceeded to retry all of the issues of fact and of state law that had already been litigated to judgment in the state court. At the close of this re-trial, the bankruptcy court concluded that the state court had made numerous errors of fact and state law, and ordered petitioner to pay respondent substantial sums of money and convey to him certain parcels of the Ranch. *Id.* at 23a-80a.

Petitioner appealed to the United States District Court for the District of Montana, which approved the bankruptcy court's decision in a summary opinion. App. 12a-22a. She then appealed to the Ninth Circuit. Before the Ninth Circuit, petitioner raised numerous issues, including the lower courts' lack of jurisdiction under the probate exception. The Circuit Court responded to her jurisdictional argument in its

unpublished opinion with a five sentence dismissal, claiming that "the probate limitation prohibits a federal court only from probating a will or administering an estate" and that the bankruptcy court's battle with the state court for jurisdiction in no way implicated the probate exception's purpose of avoiding federal interference with ongoing state proceedings. See *id.* at 4a.

Marshall v. *Marshall.* Roughly two months after *Snavely* v. *Miller* was argued and submitted to the Ninth Circuit and a month before the Circuit Court issued its opinion in that case, another panel of the Ninth Circuit decided *Marshall* v. *Marshall (In re Marshall)*, 392 F.3d 1118 (9th Cir. 2004). That case also involved an attempt to use bankruptcy proceedings to stay ongoing state court proceedings under a will and *inter vivos* trust – this time in Texas – and relitigate in a federal bankruptcy court issues already decided by a state tribunal. In contrast to its cursory, unpublished opinion in *Snavely*, however, the Ninth Circuit in *Marshall* provided a detailed discussion of the case law governing the probate exception, explicitly ruling that it extended well beyond merely probating a will or administering an estate. *Id.* at 1133 ("The reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument."). Accordingly, in *Marshall* the court held that the bankruptcy court had erred in assuming jurisdiction over a case involving the validity of an alleged *inter vivos* trust. The *Marshall* opinion was brought to the attention of the *Snavely* panel, but to no avail. (The *Snavely* opinion does not even cite to the *Marshall* opinion.) At present, a petition for writ of certiorari in *Marshall* v. *Marshall* is also pending before this Court. See Petition for Writ of Certiorari, *Marshall* v. *Marshall*, No. 04-1544 (U.S. filed May 17, 2005) ("*Marshall* Petition").

It is a testament to the confusion over the proper application of the probate exception that this Court should simultaneously entertain two petitions for certiorari from the same circuit that arise from nearly identical cases but reach opposite conclusions. That irony alone might not warrant this Court's attention, but the conflict between *Snavely* and *Marshall* is simply a stark example of the broad and deep conflicts among the circuits on the scope of the probation exception. Nor is confusion on this issue confined to a single circuit. On the contrary, there are at least four different versions of the probate exception being applied by the federal circuits today. These tests are not merely variations on a verbal theme; they go to the heart of the scope of federal jurisdiction. Simply stated, not only are substantially identical cases being decided differently within the Ninth Circuit, but all over the country the fate of a probate-related claim in federal court turns not on the application of uniform, national law, but rather on the local court's attempt to make sense of the largely pre-modern precedents of this Court and the confused and contradictory circuit court decisions that govern the exception. The resulting uncertainty as to the scope of the probate exception is in large part responsible for the bankruptcy court's utter lack of comity and respect for the state court proceeding in this case. The bankruptcy court disregarded final determinations of state probate-related law made by the state tribunal entrusted with its interpretation and application. Any rule of federal law that countenances such a result warrants this Court's attention.

ARGUMENT

I. THE CIRCUIT COURTS OF APPEAL ARE SPLIT OVER THE PROPER SCOPE OF THE PROBATE EXCEPTION TO FEDERAL JURISDICTION.

Since this Court issued its opinion in *Markham* v. *Allen*, the circuit courts have struggled unsuccessfully to come to a consensus on the scope of the probate exception. Today, the

different circuit courts follow no fewer than four different tests to determine the scope of the rule.

A. The Probate Exception In This Court And *Markham* v. *Allen*.

This Court first considered the scope of federal jurisdiction over probate matters in the case of *Armstrong* v. *Lear*, 25 U.S. (12 Wheat.) 169 (1827). Writing for the Court, Justice Story held that the equity jurisdiction of the federal courts did not extend to questions that required a ruling on the validity of an unprobated will. *Id.* at 176. Over the course of the nineteenth century, the Court decided numerous cases under the rule. See, *e.g.*, *Gaines* v. *Fuentes*, 92 U.S. 10, 17-22 (1876); *Clark* v. *Bever*, 139 U.S. 96, 102-03 (1891); *Byers* v. *McAuley*, 149 U.S. 608, 619-20 (1893). This Court's discussions of the scope of the exception were frequently couched in terms of the now long-defunct procedural distinctions between law, equity and ecclesiastical jurisdiction. See, *e.g.*, *Green's Administratrix* v. *Creighton*, 64 U.S. (23 How.) 90, 105, 106 (1860) ("The question[] presented in this suit [is] whether the subject of the suit is properly cognizable in a court of equity."); *Borer* v. *Chapman*, 119 U.S. 587, 600-01 (1887) (analyzing the probate exception with reference to "the equity jurisdiction . . . that the High Court of Chancery in England possesses). The revolution in federal procedure brought about by the adoption of the Federal Rules of Civil Procedure in 1937, however, effectively abolished these procedural differences. Not surprisingly, modern circuit courts have struggled to apply these pre-modern cases in the current system of notice pleading and the unification of law and equity. See, *e.g.*, *Akin* v. *Louisana Nat'l Bank of Baton Rouge*, 322 F.2d 749, 751-52 (5th Cir. 1963) (analogizing nineteenth-century and early twentieth-century cases); *Spears* v. *Spears*, 162 F.2d 345, 348-49 (6th Cir. 1947) (same).

This Court's sole modern opinion on the probate exception is *Markham* v. *Allen*, 326 U.S. 490 (1946). *Markham* arose

during World War II. A California decedent had executed a will leaving property to German nationals. *Id.* at 492. Under a war-time California statute, the Germans were disinherited and the decedent's American heirs-at-law commenced a state probate proceeding to invalidate the will. *Id.* A federal statute, however, had empowered the Alien Property Custodian, a federal official, to take possession of German assets in the United States. *Id.* Markham, the Custodian, brought an action in federal court seeking a declaration that he held a valid claim against the decedent's estate. The Ninth Circuit held that the probate exception deprived the federal court of jurisdiction and this Court reversed.

After a short review of its prior probate exception cases, the Court held that:

> [I]t has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Id. at 494. The Court went on to explain that Markham's federal suit would "leave undisturbed the orderly administration of [the] decedent's estate in the state probate court and to decree petitioner's right in the property to be distributed after its administration," and, accordingly, the probate exception did not apply. *Id.* at 495.

B. The Competing Circuit Tests.

In the six decades since *Markham*, the circuit courts have struggled to apply the probate exception in the face of the limited guidance provided in that opinion. Consequently, there are now at least four clearly distinct and contradictory approaches to the application of the probate exception.

1. The Fifth and Eleventh Circuits.

The Fifth and Eleventh Circuits have chosen a narrow exception that focuses on probate administration.[1] They hold that so long as the federal court is not asked to probate a will or interfere with the actual administration of an estate, it has jurisdiction.[2] See *Glickstein* v. *Sun Bank/Miami, N.A.*, 922 F.2d 666, 672-73 (11th Cir. 1991) (holding that "[t]his circuit has narrowly construed the probate exception" as not applying to cases where assets were in the hands of the defendants and the state probate court had held the will to be valid), *aborgated on other grounds*, *Saxton* v. *ACF Indus., Inc.*, 254 F.3d 959 (11th Cir. 2001); *Robertson* v. *Robertson*, 803 F.2d 136, 138 (5th Cir. 1986) ("Although federal courts generally do not possess subject matter jurisdiction over matters of probate, they may entertain suits in favor of creditors, legatees, heirs, and other claimants . . . .").

Frequently, this approach is stated in terms of whether the claim merely determines the rights of a plaintiff or if it seeks direct control over the assets of an estate. See, *e.g.*, *Michigan Tech Fund* v. *Century Nat'l Bank of Broward*, 680 F.2d 736, 739 (11th Cir. 1982) (stating that federal jurisdiction does not extend to "matters affecting state probate proceedings, *other than* to establish claims and to determine the rights of those asserting an interest in the estate" (emphasis added)). Thus, in *Escareno* v. *Carl Nolte Sohne GmbH & Co.*, 77 F.3d 407 (11th Cir. 1996) the court held that questions regarding the proper appointment of an administrator for the estate of a man who died intestate must be litigated in state probate court. In

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[1] The *Marshall* petition claims that the Second Circuit also uses this approach. *See Marshall* Petition at 12. This contention is erroneous for reasons stated *infra* at I.B.4.

[2] The *Marshall* petition labels this approach the *Markham* test. *See Marshall* Petition at 12. However, the Fifth and Eleventh Circuits' approach can only be characterized in this way by offering the narrowest possible reading of *Markham*'s holding.

contrast, in *Breaux* v. *Dilsaver*, 254 F.3d 533, 535 (5th Cir. 2001), the court allowed a suit alleging fraud and breach of fiduciary duty against the executor of an estate to proceed in federal court because "the suit is against the administrator only in his personal capacity and does not require federal interference in any state probate proceeding."

2. The Tenth, Eighth, Sixth and Fourth Circuits.

The Tenth, Eighth, Sixth, and Fourth Circuits have adopted a test that has been summarized by one commentator in this way:

> Under the 'route' test, if the dispute under state law could be adjudicated only in a probate court, then there is no federal court jurisdiction. If, however, under state law the state courts of general jurisdiction would have jurisdiction over the dispute, then federal court jurisdiction exists . . . .

Nicolas, *supra*, at 1489. See also *McKibben* v. *Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988) ("Federal jurisdiction in such matters depends upon state law . . . ."); *Sianis* v. *Jensen*, 294 F.3d 994, 998 (8th Cir. 2002) ("Generally, where the dispute over the will would be cognizable only in a state probate court, a federal court is deprived of jurisdiction over the contest, and the aggrieved party must pursue the action in the probate court."); *Bedo* v. *McGuire*, 767 F.2d 305, 306 (6th Cir. 1985) (analyzing Ohio law to determine whether the federal court has jurisdiction); *Foster* v. *Carlin*, 200 F.2d 943, 947 (4th Cir. 1952) ("federal courts have no jurisdiction over matters within the exclusive jurisdiction of state probate courts").

The important distinction between this approach and the previous one is the extent to which the outcome of the cases hinges on state law. The administration-of-the-estate approach used in the Fifth and Eleventh Circuits is functional and conceptualizes probate as a particular *activity* that is

beyond the reach of federal courts – proof of wills, appointment of executors and administrators, administration of a decedent's estate, and the like. Compare, *e.g.*, *Michigan Tech Fund*, 680 F.2d at 740 (refusing to apply the probate exception to a claim involving the interpretation of a will), with *Escareno*, 77 F.3d at 412 (stating that a federal court cannot decide who should be appointed administrator of an estate). The "route test," by contrast, is more formalistic and hinges the scope of federal jurisdiction to state procedure, regardless of whether the claim at issue falls within some functional definition of probate. Thus, for example, in *Reinhardt* v. *Kelly*, 164 F.3d 1296 (10th Cir. 1999), the Tenth Circuit divided a claim for tortious interference with an expected inheritance into three separate parts, ruling that part of the suit, which must be brought in state probate court, was barred by the exception but that the rest of the claim was not.

3. The First, Third, and Seventh Circuits.

The application of the probate exception in the First, Third, and Seventh Circuits is somewhat murkier. These courts extend the exception beyond the mere administration of the estate and those claims cognizable only in a state probate proceeding and include claims that are "ancillary to probate." See *Mangieri* v. *Mangieri*, 226 F.3d 1, 2 (1st Cir. 2000) ("[A]s a general matter, courts tend to view the probate exception as extending to all suits 'ancillary' to the probate of a will."), *Golden ex rel. Golden* v. *Golden*, 382 F.3d 348, 357 (3d Cir. 2004) ("The probate exception extends both to matters of 'pure' probate and to matters 'ancillary' to probate."), *Storm* v. *Storm*, 328 F.3d 941, 944 (7th Cir. 2003) (same).

Judge Posner provided the most extensive discussion of this approach in *Dragan* v. *Miller*, 679 F.2d 712 (7th Cir. 1982). According to Judge Posner, the identification of a claim as being "ancillary to probate" turns on the consideration of the "practical reasons for the probate exception." *Id.* at 714. These include legal certainty, judicial economy, and state

court expertise. *Id.* at 714-15. Whether or not a claim is "ancillary to probate" turns on the extent to which federal jurisdiction in the case "would impair the polices served by the probate exception." *Id.* at 715-16.

4. The Ninth and Second Circuits.

Both the Ninth Circuit and the Second Circuit have adopted a broad version of the probate exception, holding that:

> The reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument. Such questions include fraud, undue influence upon a testator, and tortious interference with the testator's intent.

In re Marshall, 392 F.3d at 1133. See also *Moser* v. *Pollin*, 294 F.3d 335, 340 (2d Cir. 2002).

The petitioner in *Marshall* argues that *Moser* and *Marshall* represent outliers and aberrations within their circuits. See, *e.g.*, *Marshall* Petition at 13 n.3 & 17 (discussing *Marshall* and *Moser*). To the extent that this argument asserts confusion even within these circuits as to the meaning and application of the probate exception, that argument is supported by the Ninth Circuit's conclusion in this case that the probate exception did not apply to the bankruptcy court's extraordinary battle with the state court over the right to declare the meaning and application of state law governing decedents' trusts.[3]

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[3] The *Marshall* petition argues that *Moser* v. *Pollin*, represents "the approach of a single panel of the Second Circuit." *Marshall* Petition at 17. However, *Moser* has been followed in unpublished Second Circuit opinions, *see Barash* v. *Stiler*, 69 Fed. Appx. 506, 508 (2d Cir. 2003), and pre-*Moser*, Second Circuit opinions have always considered whether a claim would have to be brought in a state probate court as part of their analysis, *see Lamberg* v. *Callahan*, 455 F.2d 1213, 1216 (2d Cir. 1972).

II. CONFUSION OVER THE PROBATE EXCEPTION RESULTS IN DIFFERENT TREATMENT OF SUBSTANTIALLY IDENTICAL CASES WITHIN THE FEDERAL SYSTEM.

The split among the federal circuits described above is more than a disagreement about the proper verbal formulation of the probate exception. Rather, the differing approaches of the circuits are outcome determinative, and it is clear that if this litigation had arisen in Illinois, New York, or Missouri as opposed to Montana, the outcome would have been different and the state court's decision would have been respected. In sum, there is no national consistency of federal law on this important issue, and substantially identical cases receive wildly different treatment depending on the federal court in which they are brought.

A. Federal Question Jurisdiction.

The federal courts are split on the question of whether the probate exception applies to federal question cases or is limited solely to cases predicated on diversity jurisdiction. Thus, the district court for the Western District of Tennessee explicitly rejected the contention of the United States that the probate exception did not apply to federal question jurisdiction. See *In re Estate of Threefoot*, 316 F. Supp. 2d 636, 642-43 (W.D. Tenn. 2004) (discussing and rejecting the contention of the government). Just to the north, in the Southern District of Ohio, however, the court explicitly held that the probate exception did not apply to federal questions. See *Community Ins. Co.* v. *Rowe*, 85 F. Supp. 2d 800, 806 (S.D. Ohio 1999) (stating the court had jurisdiction "due to a question of federal law" and that "[a]ccordingly, the probate exception does not apply to this action"). The confusion extends to the circuit courts as well. In *Marshall*, the Ninth Circuit explicitly applied the probate exception to bankruptcy,

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See also Green v. *Doukas*, 205 F.3d 1322 (2d Cir. 2000) (unpublished table decision), *available at* 2000 WL 236471 (citing *Lamberg*).

a federal question. See *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004). The Eleventh Circuit, in contrast, has repeatedly stated that the probate exception does not apply to federal questions. See *Glickstein*, 922 F.2d at 672 n.13 ("[T]he probate exception is an exception to diversity jurisdiction and has no application to . . . federal RICO claims."), *In re Georg*, 844 F.2d 1562, 1565 (11th Cir. 1988) ("[The probate exception] has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases."). See also *Williams* v. *Adkinson*, 792 F. Supp. 755, 761 n.9 (M.D. Ala. 1992) ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."), *aff'd*, 987 F.2d 774 (11th Cir. 1993). Thus, had this case arisen in the Eleventh Circuit, there is little doubt but that the probate exception would not have been applied, whereas had it been decided according to the framework set out by the Ninth Circuit in *Marshall*, the outcome would have been quite different.

B. Trusts.

One of the most troubling areas of lower court confusion relates to jurisdiction over trusts. In a world of increasingly complicated estate planning, trusts and other will substitutes are an important part of the state law governing the transfer of property at death. The lower courts, however, are split as to whether trusts and will substitutes fall within the probate exception. Numerous district courts in the Second Circuit have interpreted that Circuit's law as excluding trusts from the federal probate exception. See *Monahan* v. *Holmes*, 139 F. Supp. 2d 253, 259 (D. Conn. 2001) ("The probate exception does not apply to trusts . . . ."); *Wiengarten* v. *Warren*, 753 F. Supp. 491, 494 (S.D.N.Y. 1990) (same); *Barnes* v. *Brandrup*, 506 F. Supp. 396, 399 (S.D.N.Y. 1981) (same); *Schonland* v. *Schonland*, No. Civ. 397CV558, 1997 WL 695517, at *2 (D. Conn. Oct. 23, 1997) (same). Likewise, the Eleventh Circuit has strongly suggested that the probate exception would not apply to trusts. See *Glickstein*,

922 F.2d at 673 (holding that RICO claims arising out of the administration of a trust did not come within the exception because there was no dispute over a will). In contrast the Third, Seventh, Eighth and Ninth Circuits have all held that the probate exception applies to trusts and will substitutes. See *Golden*, 382 F.3d at 359; *Macken ex rel. Macken* v. *Jensen*, 333 F.3d 797, 799 (7th Cir. 2003); *Sianis*, 294 F.3d at 999 (stating that the circuit's cases "have recognized that there might be instances when the probate exception applies [to] actions involving trusts"); *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004) (applying the probate exception to claims involving trusts).[4] Had Mr. Miller filed for bankruptcy in the Eleventh Circuit or in Connecticut, he might have prevailed under a *per se* rule excluding trusts from the probate exception, whereas had he filed for bankruptcy in Chicago or St. Louis, Bonnie Snavely could have invoked the probate exception with regard to her administration of her mother's trust.

C. Claims Against The Administrator Of An Estate.

The federal courts are also split on whether or not they have jurisdiction to entertain claims of fraud and breach of fiduciary duty against the administrator of an estate. Compare *Bedo*, 767 F.2d at 306 (holding the federal court lacked jurisdiction over breach of fiduciary duty claims), with *Breaux*, 254 F.3d at 536-37 (allowing a suit against the administrator of the estate to go forward). Hence, the First and Third Circuits have held that such claims cannot be brought in federal court because state law confines them to probate courts, see *Mangieri*, 226 F.3d at 2-3; *Golden*, 382 F.3d at 360-62, and the Sixth Circuit has disallowed them

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[4] The United States has also taken the position that the probate exception does not apply to trusts, a position that was explicitly rejected in *In re Threefoot*, 316 F. Supp. 2d at 644 ("The government also argues that the probate exception does not apply to disputes over will substitutes, such as trusts. That argument is not supported by [the] case law.").

because they interfere with the ongoing administration of an estate. See *Lepard* v. *NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004). In contrast, the Fifth, Eighth, Tenth and Eleventh Circuits have all held that the probate exception does not preclude such claims. See *Breaux*, 254 F.3d at 536-37; *Bassler* v. *Arrowood*, 500 F.2d 138, 141-42 (8th Cir. 1974); *Newland* v. *Newland*, 82 F.3d 338, 341 n.2 (10th Cir. 1996); *Glickstein*, 922 F.2d at 672-73. This issue is potentially implicated by the *Marshall* petition, now pending before the Court, which involved a suit against the administrator of an estate.

D. Claims For Tortious Interference With An Inheritance.

The confused Ninth Circuit cases out of which this petition and the *Marshall* petition flow also implicate the split over the status of probate-related tort claims. Rather than direct attacks on the validity of a will in probate or the administration of an estate, inheritance-related disputes frequently take the form of a tort claim for interference with an inheritance against some alleged malfeasor. The federal courts are split as to whether or not such actions come within the probate exception. The Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits have held that they do. See *Moore* v. *Graybeal*, 843 F.2d 706, 709-11 (3d Cir. 1988); *Turja* v. *Turja*, 118 F.3d 1006, 1008-10 (4th Cir. 1997); *Storm*, 328 F.3d at 944-46; *Sianis*, 294 F.3d at 998; *In re Marshall*, 392 F.3d at 1135-36; *Reinhardt*, 164 F.3d at 1300. The Third, Fifth, Seventh and Eleventh Circuits, however, have held that such claims are not precluded by the probate exception. See *Golden*, 382 F.3d at 365-66; *DeWitt* v. *Duce*, 599 F.2d 676, 677 (5th Cir. 1979) (per curiam); *Georges* v. *Glick*, 856 F.2d 971, 974-75 (7th Cir. 1988); *Glickstein*, 922 F.2d at 672-73.[5]

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[5] In addition to the split between the circuits, the issue is further confused by the fact that there are intra-circuit splits on this question in both the Third and the Seventh Circuits, with panels in both circuits

E. The Effect Of A Federal Decision On State Proceedings.

The federal courts are also divided on whether or not a federal decision that effectively reverses a state probate decision or that, through *res judicata*, renders a state proceeding a mere rubber stamp constitutes interference with probate proceedings thus triggering the exception. Hence, the Second, Third and Ninth Circuits have all held that such federal cases are precluded by the probate exception. See *Moser*, 294 F.3d at 343; *Golden*, 382 F.3d at 360; *In re Marshall*, 392 F.3d at 1135. The Fifth, Seventh and Eleventh Circuits, in contrast, have held that even if a federal decision displaces a state probate court's decision, the probate exception is not triggered. See *Breaux*, 254 F.3d at 536-37; *Georges*, 856 F.2d at 974-75; *Michigan Tech Fund*, 680 F.2d at 740. Thus, had Mr. Miller filed for bankruptcy in New York, the potential *res judicata* effect of the federal court's adjudication of the case would have precluded interference with the state court's proceedings.

F. Power To Order An Accounting.

The district courts are also confused as to whether or not there is federal jurisdiction to order an accounting. The confusion is most dramatically illustrated by federal cases commenced in the state of Ohio. A federal plaintiff seeking an accounting in the Northern District of Ohio would find that such a remedy is not precluded by federal respect for probate courts. See *Hartline* v. *Hartline*, No. 5:00CV1529, 2001 WL 418747 (N.D. Ohio Feb. 28, 2001). Just to the south in the Southern District of Ohio, however, the court would reach the opposite conclusion. See *Bortz* v. *DeGolyer*, 904 F. Supp.

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holding that the probate exception prohibits tortious interference claims and panels holding that it does not. *Compare Moore*, 843 F.2d at 709-11 (holding that the probate exception precludes the claims), *and Storm*, 328 F.3d at 944-46 (same), *and Dragan*, 679 F.2d at 717 (same), *with Golden* , 382 F.3d at 365-66 (holding that the exception does not preclude the claims), *and Georges*, 856 F.2d at 974-75 (same).

680, 684 (S.D. Ohio 1995). See also *Sisson* v. *Campbell Univ., Inc.*, 688 F. Supp. 1064, 1068 (E.D.N.C. 1988) (holding that a federal court cannot order an accounting). This split is implicated by this case because the bankruptcy court, at Respondent's urging, adjudicated the sufficiency of Petitioner's accounting under state law and imposed penalties for alleged deficiencies in Petitioner's accounting. Compare App. 27a-64a (the bankruptcy court's adjudication of the adequacy of Petitioner's accounting), with *id.* at 111a-133a (the State Court's contrary, previous ruling on the accounting issues).

In short the absence of a single, clear, and nationally consistent analytic framework for the probate exception has led to massive confusion in the lower courts, resulting in wildly disparate treatment of essentially the same issues depending entirely on the federal court in which an action is brought.

III. CONFUSION OVER THE PROBATE EXCEPTION LEADS FEDERAL COURTS TO TREAD ON THE UNIQUELY STATE PREROGATIVES THAT THIS COURT HAS STATED LIE AT THE HEART OF THE RULE.

Our federal system of government requires a careful balancing of interests and jurisdiction in order to avoid friction between state and federal courts. Accordingly, Congress and this Court have crafted federalism-maintaining mechanisms to insure that federal courts show proper respect for state courts and their proceedings. These devices include the Anti-Injunction Act, 28 U.S.C. § 2283, the requirement that federal courts give full faith and credit to state judgments, see *id.* § 1738; see also *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, No. 03-1696, slip op. at 11 (U.S. Mar. 30, 2005) ("The Full Faith and Credit Act originally enacted in 1790 requires the federal court to 'give the same preclusive effect to a state-court judgment as another court of that State would give.'" (citations omitted)); *San Remo Hotel, L.P.* v.

San Francisco, No. 04-340, slip op. at 2 (U.S. June 20, 2005) (rejecting a Takings Clause exception to § 1738's demand that federal courts give full faith and credit to state court judgments), and the various federal abstention doc-trines, see *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). Although the probate exception goes directly to the subject matter jurisdiction of the federal courts, it is also one of these federalism-maintaining devices.

This Court and the lower federal courts have repeatedly emphasized that the probate exception stems from the special interest that states have with the disposition of property at death and the special expertise of the state courts in probate matters. Hence, the Court observed in *O'Callaghan* v. *O'Brien*, 199 U.S. 89, 110 (1905), that the probate exception exists because "authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective." Moreover, in *Harris* v. *Zion's Savings Bank & Trust Co.*, 317 U.S. 447, 450 (1943), the Court stated that "the right to succeed to the ownership of realty and personalty are peculiarly matters of state law." Lower federal courts have also acknowledged that probate matters "raise issues 'in which the states have an especially strong interest and a well-developed competence for dealing with them.'" *Phillips, Nizer, Benjamin, Krim & Ballon* v. *Rosenstiel*, 490 F.2d 509. 516 (2d Cir. 1973). See also *Bassler*, 500 F.2d at 142-43 ("The area of probate and decedents' estates present many varied problems. State courts deal with these problems daily and have developed an expertise which should discourage federal court intervention. These local problems should be decided by state courts."). Cf. *Dragan*, 679 F.2d at 715 ("[T]here is an argument -- call it the argument from

relative expertness – for confining the adjudication of probate-type issues to state court even when they arise in proceedings that otherwise might not be clearly classifiable as probate proceedings.").

Bonnie Snavely's case, however, illustrates that this federalism-maintaining concern for state prerogatives cannot exist in the face of profound uncertainty as to the scope of the probate exception. In this case, the inability of the bankruptcy court and the State Court to agree on the meaning of the probate exception transformed what should have been a protected area for claims that "are peculiarly matters of state law" into the most intrusive possible kind of federal action: an injunction issued by a federal judge prohibiting a state judge from continuing her ongoing state court proceedings. Compare App. 92a-94a (state court holding that the probate exception deprived the bankruptcy court of jurisdiction), with *id.* at 81a-91a (bankruptcy court's finding that the automatic stay applied to the state court proceeding). In *Bank of Tennessee* v. *Vaiden*, 59 U.S. (18 How.) 503, 507 (1855), this Court observed that without the probate exception "the conflict of jurisdictions would be irreconcilable and disastrous." As this case and the *Marshall* case illustrate, however, six decades of doctrinal drift in this area, have made such unseemly and disastrous conflicts of jurisdiction routine.

CONCLUSION

For the foregoing reasons, Petitioner urges the Court to grant the writ of certiorari in this case and in *Marshall* v. *Marshall* in order to clarify the scope of the probate exception.

Respectfully submitted,

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